Malayan Banking Bhd v Koay Kang Chuwan & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–368 OF 2002
ABDUL MALIK ISHAK, JEFFREY TAN AND AZHAR MA'AH JJCA
10 MARCH 2010

Land Law — Charge — Order for sale — Setting aside — Whether inordinate delay in making application

On 10 October 1986, the appellant obtained an order for sale of the first respondent's property. Despite being served with the pleadings, the first respondent had failed to enter appearance, nor attend court when the order was granted. The first respondent did also appeal against the said order. On 11 September 1991, the property was sold by public auction to the second respondent. By summons in chambers re-dated 16 July 1999, the first respondent applied to set aside the order for sale of the property. Despite the delay of some 12 years, the High Court allowed the first respondent's application. The appellant appealed to the Court of Appeal, raising five main grounds, to wit: (i) the High Court erred in finding that the omission to serve the appellant's solicitor's affidavit stating the amount due to the chargee was fatal under s 257(1)(c) of the National Land Code ('NLC'); (ii) the High Court erred in finding that the order for sale dated 10 October 1986 was void due to the omission to serve the appellant's solicitor's affidavit; (iii) the High Court judge erred when he failed to set aside the first respondent's application due to the unexplained, inordinate delay of more than ten years; (iv) the High Court judge erred in law in failing to dismiss the application by relying on *Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor* [1996] 1 MLJ 374; and (v) the High Court judge erred in failing to hold that the first respondent was estopped from filing the application to set aside the order for sale after a lapse of 12 years nine months and six days.

Held, allowing the appeal with costs:

(1) In the instant case, there was no appeal filed by the first respondent against the order for sale dated 10 October 1986. Further, the total amount due was specified in the order for sale itself. There was thus no contravention of s 257(1)(c) of the NLC. The order for sale was properly issued (see paras 17–18); *V Letchumanan v Central Malaysian Finance Bhd* [1980] 2 MLJ 96 distinguished.

(2) The omission to serve the first respondent with the affidavit of the appellant's solicitor did not nullify the order for sale. The failure to serve the first respondent with the affidavit of the appellant's solicitor was an

irregularity and not a nullity under O 2 r 1(1) of the Rules of the High Court 1980. The irregularity was curable (see paras 20, 22 & 24).

(3) There was no valid or reasonable reason for the 12 years nine months six day delay. There was no need for the court to examine the merits of the appeal once the issue of delay was resolved in the appellant's favour. The inordinate delay could not be tolerated by the court. The first respondent's application ought to be dismissed forthwith (see paras 37, 40 & 43).

(4) The case of *Muniandy a/l Thamba Kaundan* could be distinguished in the instant case. In the instant case, the first respondent was personally served with the notice of appointment to hear the originating summons and he was aware of the hearing date but failed to be present in court on 10 October 1986. It could not be argued that the first respondent was deprived of the right to be heard (see para 45).

(5) In the instant case, the conduct of the first respondent after the order for sale was obtained on 10 October 1986 led the appellant to believe that the first respondent was contented that the property was auctioned off. The first respondent could not now be heard to say that the order for sale had to be set aside (see para 51).

[Bahasa Malaysia summary

Pada 10 Oktober 1986, perayu telah mendapatkan satu perintah jualan bagi harta responden pertama. Walaupun pliding telah disampaikan kepadanya, responden pertama telah gagal untuk merekodkan kehadiran atau untuk hadir ke mahkamah ketika perintah tersebut diberikan. Responden pertama juga telah merayu terhadap perintah tersebut. Pada 11 September 1991, harta tersebut dijual dalam satu lelongan awam kepada responden kedua. Dalam satu saman dalam kamar ditarikhkan semula sebagai 16 Julai 1999, responden pertama memohon untuk mengetepikan perintah untuk jualan harta tersebut. Meskipun terdapat kelewatan selama 12 tahun, Mahkamah Tinggi membenarkan permohonan responden pertama. Perayu merayu di Mahkamah Rayuan dan membangkitkan lima alasan: (i) Mahkamah Tinggi telah khilaf dalam penemuan bahawa kegagalan untuk menyampaikan kepada peguam perayu afidavit yang menyatakan jumlah perlu dibayar kepada pemegang gadaian adalah memudaratkan di bawah s 257(1)(c) Kanun Tanah Negara ('KTN'); (ii) Mahkamah Tinggi telah khilaf dalam penemuan bahawa perintah jualan bertarikh 10 Oktober 1986 adalah tidak sah kerana kegagalan untuk menyampaikan afidavit kepada peguam perayu; (iii) hakim Mahkamah Tinggi telah khilaf apabila beliau gagal untuk mengetepikan permohonan responden pertama atas kelewatan yang melampau dan tidak beralasan melebihi 10 tahun; (iv) hakim Mahkamah Tinggi telah khilaf kerana gagal menolak permohonan berdasarkan kes *Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor* [1996]

1 MLJ 374; and (v) hakim Mahkamah Tinggi telah khilaf kerana gagal memutuskan bahawa responden pertama diestop daripada memfailkan permohonan untuk mengetepikan perintah jualan selepas melebihi had masa selama 12 tahun sembilan bulan dan enam hari.

Diputuskan, membenarkan rayuan dengan kos:

(1) Dalam kes ini, tiada rayuan difailkan oleh responden pertama terhadap perintah jualan bertarikh 10 Oktober 1986. Selanjutnya, jumlah yang perlu dibayar telah dinyatakan dalam perintah jualan tersebut. Oleh itu, tidak terdapat percanggahan terhadap s 257(1)(c) KTN. Perintah jualan telah dikeluarkan dengan betul (lihat perenggan 17–18); *V Letchumanan v Central Malaysian Finance Bhd* [1980] 2 MLJ 96 dibezakan.

(2) Kegagalan untuk menyampaikan afidavit peguam perayu kepada responden pertama tidak membatalkan perintah jualan. Kegagalan untuk menyampaikan afidavit peguam perayu kepada responden pertama adalah satu salah aturan dan bukan pembatalan di bawah A 2 k 1(1) Kaedah-Kaedah Mahkamah Tinggi 1980. Salah aturan tersebut boleh diperbetulkan (lihat perenggan 20, 22 & 24).

(3) Tiada alasan yang sah atau wajar bagi kelewatan selama 12 tahun sembilan bulan enam hari tersebut. Mahkamah tidak perlu memeriksa merit rayuan tersebut setelah isu kelewatan telah diputuskan berpihak kepada perayu. Mahkamah juga tidak patut bertolak ansur dengan kelewatan melampau tersebut. Permohonan responden pertama juga seharusnya ditolak dengan serta merta (lihat perenggan 37, 40 & 43).

(4) Kes *Muniandy a/l Thamba Kaundan* boleh dibezakan di dalam kes ini. Dalam kes ini, notis pelantikan untuk mendengar saman pemula telah diserahkan secara persendirian kepada responden pertama dan beliau sedar akan tarikh perbicaraan tetapi gagal untuk hadir di mahkamah pada 10 Oktober 1986. Adalah tidak disangkalkan bahawa responden pertama telah terkilan akan haknya untuk didengar (lihat perenggan 45).

(5) Dalam kes ini, perlakuan responden pertama selepas perintah jualan diperolehi pada 10 Oktober 1986 menyebabkan perayu mempercayai bahawa responden pertama berpuashati bahawa harta tersebut telah dilelong. Responden pertama kini tidak boleh mengatakan bahawa perintah jualan harus diketepikan (lihat perenggan 51).]

Notes

For cases on order of sale, see 8(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2376–2525.

Cases referred to

Bank Bumiputra Malaysia Bhd v Syarikat Gunong Tujoh Sdn Bhd & Ors [1990] 1 MLJ 298, HC (refd)

Bernstein and another v Jackson and another [1982] 1 WLR 1082, CA (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331, FC (refd)

Chong Keat Realty Sdn Bhd v Ban Hin Lee Bank Bhd [2003] 3 MLJ 321, CA (refd)

CHS, Re [1997] 3 MLJ 152, HC (refd)

Dubai Bank Ltd v Galadari and others (No 4) The Times, 23 February 1990, Ch D (refd)

Frazer v Walker and Others [1967] 1 AC 569, PC (refd)

Golden Ocean Assurance Ltd and World Mariner Shipping SA v Christopher Julian Martin and others (The 'Goldean Mariner') [1990] 2 Lloyd's Rep 215, CA (refd)

Harkness v Bell's Asbestos and Engineering Ltd [1967] 2 QB 729, CA (refd)

Kanciltek (M) Sdn Bhd v Mayban Finance Berhad [2000] 4 AMR 4960, HC (refd)

Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor [1989] 1 MLJ 457, PC (refd)

Kho Kwang Choon v Phuman Singh [1968] 1 MLJ 183, HC (refd)

Khor Cheng Wah v Sungai Way Leasing Sdn Bhd [1996] 1 MLJ 223, CA (refd)

Kuah Kok Kim v Chong Lee Leong Seng Co (Pte) Ltd [1991] 2 MLJ 129, CA (refd)

Lim Yoon Loy & Ors v Lee Lan [1990] 2 MLJ 425, HC (refd)

M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor [1994] 1 MLJ 294, SC (refd)

Malayan Banking Bhd & Anor v Swasta Jaya Sdn Bhd [1990] 2 MLJ 12, SC (refd)

Metroinvest Ansalt v Commercial Union Assurance Co [1985] 1 WLR 513, CA (refd)

MUI Bank Bhd v Cheam Kim Yu (Beh Sai Ming, intervener) [1992] 2 MLJ 642, SC (refd)

Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor [1996] 1 MLJ 374; [1996] 2 CLJ 586, FC (distd)

Ong & Company Pte Ltd v Carl Y L Chow [1987] 2 MLJ 430, HC (refd)

Ong Chat Pang & Anor v Valliappa Chettiar [1971] 1 MLJ 224, FC (refd)

Oversea-Chinese Banking Corp Ltd v Measurex Corp Bhd [2002] 4 SLR 578, HC (refd)

Puspavathy a/p Thaveethu v Majlis Perbandaran Klang & Ors and other appeals [2008] 6 MLJ 672, CA (refd)

Regenthill Properties Pte Ltd v Management Corporation Strata Title Plan No 2192 [2002] 3 SLR 445, CA (refd)

Tan Ying Hong v Tan Sian San & Ors [2010] 2 MLJ 1, FC (refd)

Teh Bee v K Maruthamuthu [1977] 2 MLJ 7, FC (refd)
Tye Chwee Hoon v Cayman Commodities (M) Sdn Bhd & Anor [1989] 2 MLJ 317, HC (refd)
V Letchumanan v Central Malaysian Finance Bhd [1980] 2 MLJ 96, FC (distd)

Legislation referred to

National Land Code ss 257(1)(c), 340, 340(2), (3), (4)
Rules of the High Court O 2 r 1, 1(1), O 3 r 6, O 83 r 3

Appeal from: Originating Summons No F31–1265 of 1986 (High Court, Kuala Lumpur)

Shantini Koshy (TN Yong & Rakan-Rakan & Associates) for the appellant.
KK Lai (KK Lai & Co) for the first respondent.
YY Ho (YY Ho & Lee) for the second respondent.

Abdul Malik Ishak JCA (delivering judgment of the court):

BACKGROUND FACTS

[1] On 10 October 1986, the Kuala Lumpur High Court judge made an order for sale by way of a public auction in respect of a property held under HS (D) 10863, PT 1220, Mukim of Sungai Buloh, Selangor ('property') charged to the appellant bank by the first respondent (Koay Kang Chuwan). That order for sale of the property by public auction can be seen at pp 25–26 of the appeal record and it was worded in this way:

ORDER

UPON THE APPLICATION of the Plaintiff abovenamed AND UPON READING the Originating Summons dated the 13th day of May 1986 and the Affidavits of Mr Yoong Tau Pin affirmed on the 13th day of May 1986 and Mr. Chew Hai Chee affirmed on the 8th day of October 1986 and all filed herein AND UPON HEARING Mr Chew Hai Chee of Counsel for the Plaintiff IT IS ORDERED that the whole of the land held under H.S. (D) 10863, P.T. 1220, Mukim of Sungei Buloh, Selangor and charged to the Plaintiff by the Defendant by Charges vide Presentation No: 24574/83 & 24575/83 Jilid: 102 & 102 and Folio: 78 & 79 registered in the Registrar of Titles, Selangor be and is hereby sold by public auction under the direction of this Honourable Court on the 4th day of May 1987 for the recovery of the sum of $18,111.00 as on 10th day of October 1986 on the term loan account and $194,147.33 as on 10th day of October 1986 on the housing loan account being the principal amount and accrued interest advanced to the Defendant on the said Charge together with daily interest thereon at $6.80 on the term loan account and $62.50 on the housing loan account calculated from the 11th day of October 1986 respectively to the date of payment in accordance with the terms of the said Charges AND IT IS ORDERED that the

Senior Assistant Registrar do fix a reserve price for the purpose of the sale AND IT IS FURTHER ORDERED that all costs and expenses of and incidental to this application and such sale be taxed at a normal scale by the proper officer of this Honourable Court AND IT IS FURTHER ORDERED that the parties are (at) liberty to apply AND IT IS LASTLY ORDERED that the proper authorities do register the name/s of the Purchaser/s.

Dated the 10th day of October 1986.

Sgd. Illegible

Senior Assistant Registrar

High Court, Kuala Lumpur.

[2] The appellant bank instituted the foreclosure proceedings by way of an Originating Summons No F31–1265 of 1986 dated 13 May 1986 (see pp 20–22 of the appeal record) against the first respondent for the sale of the property charged to the appellant bank simply because the first respondent failed to service the monthly instalments. The originating summons together with the affidavit in support affirmed by Yoong Tau Pin on 13 May 1986 (see pp 56–58 of the appeal record) were served on the first respondent personally on 9 June 1986. The affidavit of service evidencing service can be seen at pp 59–60 of the appeal record. Gurmeet Singh from Messr Bahari, Mohamed & Yong affirmed the affidavit of service on 21 June 1986 and there he deposed as follows:

1. I did on Monday, the 9th day of June 1986 at about 12.30 p.m. personally served on the defendant abovenamed (referring to the first respondent) with a copy of the originating summons annexed with the affidavit in support thereof in this action at No: 2, Jalan SS 25/39, Taman Mayang, Petaling Jaya, Selangor.
2. The defendant (referring to the first respondent) admitted to me that he was the right person named in the said originating summons and accepted my service by endorsing his signature at the back of my service copy.
3. At the time of the said service, the said originating summons was subscribed in the manner and form prescribed by the Rules of the High Court 1980.
4. I did on Monday, the 9th day of June 1986 endorsed on the said originating summons the day of the month and the week of the said service and attached herewith the same marked 'GS 1'.

[3] The notice of appointment to hear the originating summons which was fixed for hearing on 10 October 1986 was also served personally on the first respondent. Again, Gurmeet Singh affirmed an affidavit of service on 27 August 1986 as seen at pp 61–62 of the appeal record and this was what he deposed to:

1. I did on Friday, the 22nd day of August 1986 at about 8.45 p.m. personally served on the defendant abovenamed (referring to the first respondent) with a copy of the notice of appointment to hear the originating summons in this action at No: 2, Jalan SS 25/39, Taman Mayang, Petaling Jaya, Selangor.
2. The defendant (referring to the first respondent) accepted my service by endorsing his signature at the back of my service copy.
3. At the time of the said service, the said notice of appointment to hear the originating summons was subscribed in the manner and form prescribed by the Rules of the High Court 1980.
4. I did on Friday, the 22nd day of August 1986 endorsed on the said notice of appointment the day of the month and the week of the said service and attached herewith the same marked 'GS-1'.

[4] The first respondent failed to enter an appearance and failed to attend court when the order for sale was granted on 10 October 1986. The certificate of non-appearance can be seen at p 23 of the appeal record. It must be borne in mind that the first respondent did not file an appeal against the order for sale that was granted on 10 October 1986.

[5] It took time to auction the property. Finally, on 11 September 1991 by way of a public auction, the property was sold at the price of RM196,000 to the second respondent (Koid Saw Ee).

[6] The second respondent's position as the registered proprietor of the property was challenged on 23 October 1996 when the first respondent filed a summons in chambers praying, inter alia, that the order for sale be set aside. That summons in chambers dated 23 October 1996 can be seen at pp 37–38 of the appeal record and it was worded in this way:

(a) bahawa Perintah Mahkamah yang bertarikh 10hb. Oktober, 1986 diketepikan;

(b) bahawa ekoran dari Perintah tersebut dibatalkan Pendaftar Hakmilik Tanah Negeri Selangor diperintahkan untuk membatalkan Memorial Pindahmilik hartanah yang dipegang di bawah H.S.(D) 10863, P.T. 1220, Mukim Sungei Buloh, Selangor daripada Defendan kepada KOID SAW EE (P) (No. K.P. 7526501) menurut lelongan awam yang telah diadakan pada 11hb. September, 1991;

(c) bahawa Plaintif diperintahkan memulangkan hasil jualan sejumlah RM196,000.00 kepada KOID SAW EE (P) (No. K.P. 7526501);

(d) bahawa kos permohonan ini ditaksirkan dan dibayar oleh Plaintif kepada Defendan; dan

(e) lain-lain relif Mahkamah yang mulia ini anggap suai dan manfaat.

[7] Calculated from 10 October 1986 to 23 October 1996, the first respondent applied to set aside the order for sale of the property after ten years and 13 days. Slightly more than a decade. It was indeed a long time.

[8] The summons in chambers was amended by re-dating it from '23.10.1996' to '16.7.1999' as reflected at pp 39–40 of the appeal record. That being the case, the delay for filing the summons in chambers seeking, inter alia, to set aside the order for sale of the property was 12 years nine months and six days.

[9] On 22 April 2000, the Kuala Lumpur High Court gave an order in terms of the summons in chambers particularly prayers (a), (b), (c) and (d) with liberty to the appellant bank to apply (see the notes of evidence at p 55 of the appeal record). That order of the Kuala Lumpur High Court dated 22 April 2000 was worded in this way (see pp 8–9 of the appeal record):

PERINTAH

ATAS PERMOHONAN Defendan Pertama DAN SETELAH MEMBACA Saman Dalam Kamar Terpinda yang bertarikh 15hb Oktober, 1999, Afidavit yang diikrarkan oleh Koay Kang Chuwan pada 22hb Oktober, 1996, Afidavit Balasan yang diikrarkan oleh Lim Jit Tu pada 2hb Disember, 1996, Afidavit Jawapan Defendan yang diikrarkan oleh Koay Kang Chuwan pada 10hb Disember, 1996, Afidavit Balasan Kedua Plaintif yang diikrarkan oleh Lim Jit Tu pada 21hb Julai, 1997, dan Afidavit Jawapan Lanjutan Defendan yang diikrarkan oleh Koay Kang Chuwan pada 19hb Ogos, 1997, DAN SETELAH MENDENGAR Encik K K Lai peguam Defendan Pertama dan menyebut bagi pihak peguam Defendan Kedua dan Encik T.M. Chuah peguam Plaintif ADALAH DIPERINTAHKAN bahawa Perintah Mahkamah yang bertarikh 10hb Oktober, 1986 diketepikan DAN JUGA DIPERINTAHKAN bahawa Pendaftar Hakmilik Tanah Negeri Selangor diperintahkan untuk membatalkan Memorial Pindahmilik hartanah yang dipegang di bawah H.S. (D) 10863, P.T. 1220, Mukim Sungei Buloh, Selangor daripada Defendan Pertama kepada Defendan Kedua KOID SAW EE (P) (No KP 7526501) menurut lelongan awam yang telah diadakan pada 11hb September, 1991 DAN SELANJUTNYA DIPERINTAHKAN bahawa Plaintif diperintahkan memulangkan hasil jualan sejumlah RM196,000.00 kepada Defendan Kedua KOID SAW EE (P) (No KP 7526501) DAN SELANJUTNYA DIPERINTAHKAN bahawa kos permohonan ini ditaksirkan dan dibayar oleh Plaintif kepada Defendan Pertama DAN AKHIRNYA DIPERINTAHKAN bahawa Plaintif diberikan kebebasan untuk meneruskan prosiding Saman Pemula dalam tindakan ini.

Bertarikh pada 22hb April, 2000.

Sgd Illegible

Penolong Kanan Pendaftar

Mahkamah Tinggi

Kuala Lumpur.

[10] Aggrieved by the decision of the Kuala Lumpur High Court, the appellant bank obtained leave from this court on 6 May 2002 (see the order at pp 41–42 of the appeal record) and accordingly filed an appeal to this court dated 14 May 2002 as seen at pp 10–12 of the appeal record.

MEMORANDUM OF APPEAL

[11] Five main grounds were raised by the appellant bank in their memorandum of appeal. I shall deal with them in quick succession.

The first ground

[12] It was worded in this way: that the learned judge of the High Court erred in that the omission to serve the appellant's affidavit that was affirmed on 8 October 1986 on the first respondent was fatal in that it contravened s 257(1)(c) of the National Land Code 1965 ('NLC').

[13] Now, the appellant bank's affidavit that was affirmed on 8 October 1986 was in fact the affidavit that was affirmed by Chew Hai Chee as seen at pp 63–64 of the appeal record. That affidavit was worded in this way:

1. I am a Legal Assistant in the employment of Messrs. Bahari, Mohamed & Yong, solicitors for the Plaintiff herein. I have personal conduct of the matter and have full knowledge of the facts deposed herein and I am duly authorised to affirm this Affidavit on behalf of the Plaintiff.
2. I crave leave of this Honourable Court to refer to the Originating Summons dated the 13th day of May 1986 whereby the Plaintiff is claiming inter alia that the property held under H.S. (D) 10863, P.T. 1220, Mukim of Sungei Buloh, and charged to the Plaintiff be sold by public auction under sections 256 and 257 of the National Land Code to satisfy the total sum due to the Chargee/Plaintiff at the date of the Order together with interests at the prescribed rate.
3. I further crave leave of this Honourable Court to refer to the Notice of Appointment to hear the Originating Summons fixing the 10th day of October 1986 for the hearing of the same.
4. I state that the sums due and owing by the Defendant as at the 10th day of October 1986 are as follows:

(i) Term Loan Account — $18,111.00 Daily interest thereon from 11th October 1986 $6.80;

(ii) Housing Loan Account — $194,147.33 Daily interest thereon from 11th October 1986 $62.50;

A copy of the statement of accounts is annexed hereto and marked as 'CHC 1'.

A

5. In the premises, I humbly pray that this Honourable Court will grant an order for sale in terms of the prayers contained in the Originating Summons filed herein.

B

[14] Chew Hai Chee's affidavit specified the total amount due to the chargee ('appellant bank') at the date on which the order for sale was made. Section 257(1)(c) of the NLC enacts as follows:

257 Matters to be dealt with by order for sale

C

(1) Every order for sale made by the Court under section 256 shall be in Form 16H and shall:

(c) specify the total amount due to the chargee at the date on which the order is made; and

D

[15] The first respondent submitted that the failure to serve Chew Hai Chee's affidavit was fatal. The case of *V Letchumanan v Central Malaysian Finance Bhd* [1980] 2 MLJ 96 would certainly be of assistance. There the total amount due was not specified at the date of the order for sale and it was not raised until the appeal against the granting of the order was heard by Chang Min Tat J (later FCJ). His Lordship had this to say at p 98:

E

F

G

This provision requires the chargee to produce at the hearing of the summons for an order of sale evidence of the amount of the loan and the interest accrued to date at the hearing of the summons. Most annexures to charges contain a provision that the statement of the chargee or the chargee's accountant shall be conclusive proof of the indebtedness of the chargor. The annexure in the instant case had no such provision. Nevertheless, it was required of the respondent to produce evidence of such amount for incorporation in the order of sale sought from the court. This the respondent did not do and the order of court did not therefore specify the total amount due to the chargee. This last objection was therefore the most substantial of the various objections taken by the appellant but his then counsel did not take it in the court below and we were not predisposed at this stage of the proceedings to consider it.

H

[16] Chang Min Tat J (later FCJ) dismissed the appeal of the appellant in *V Letchumanan v Central Malaysian Finance Bhd*. It would appear that His Lordship did not consider that the absence of such specification as to the total amount due at the date on which the order was made was fatal. The omission did not render the order for sale ineffectual because nothing was done to stop the sale. It would also appear that the omission was a remediable defect.

I

[17] In the instant appeal, two distinguishing features stand out like sore thumbs. Firstly, there was no appeal filed by the first respondent against the

order for sale dated 10 October 1986 that was granted by the High Court judge. Secondly, the order for sale of the property by public auction as reproduced earlier showed that the total amount due was specified in the order itself.

[18] For these reasons, we hold that there was no contravention of s 257(1)(c) of the NLC and that the order for sale of the property by the High Court judge on 10 October 1986 was correctly and legally done.

The second ground

[19] The second ground concerned that part of the decision of the High Court judge which held that the order for sale dated 10 October 1986 was void for the omission in not serving the affidavit of Chew Hai Chee containing the necessary particulars to the first respondent.

[20] In our judgment, the omission to serve the first respondent with the affidavit of Chew Hai Chee did not nullify the order for sale dated 10 October 1986 for the following reasons:

(a) That the originating summons dated 13 May 1986 together with the affidavit in support affirmed by Yoong Tau Pin on 13 May 1986 as well as the notice of appointment to hear the originating summons were served by Gurmeet Singh personally on the first respondent.

(b) That the first respondent was represented by his own solicitors Messrs Ismail Sabri & Wee at the material time and that his solicitors had requested to the appellant bank's solicitors Messrs Bahari Mohamad & Yong by letter dated 26 June 1986 as seen at p 138 of the appeal record to postpone the matter pending amicable settlement.

(c) That the first respondent knew of the foreclosure proceedings taken by the appellant bank but failed to defend the action.

(d) That the first respondent knew of the order for sale dated 10 October 1986 but he did not challenge the said order or the amount owing by him to the appellant bank, instead he wrote a letter to the appellant bank dated 22 March 1990 as seen at p 149 of the appeal record and in that letter he confirmed that there was a prospective buyer in the person of the second respondent who offered to purchase the property at the price of RM150,000 and that he agreed with that offer on condition that the proceeds would go to the appellant bank. In that letter he too stated that he was incapacitated by being adjudicated a bankrupt and that he required the official assignee to execute the sale and purchase agreement in the capacity of a vendor. In that letter, he also stated that the second respondent had instructed her solicitors to

draw up the sale and purchase agreement and to forward the same to the official assignee for his consent and signature thereto.

(e) The second respondent through her solicitors Messrs K Thurairaj & Associates wrote a letter to the appellant bank dated 17 May 1990 as seen at pp 150–151 of the appeal record and that letter was worded as follows:

> We act for Miss Koid Saw Ee.
>
> We refer to the above and are pleased to recapitulate from the outset, thus:
>
> 1. that our client is desirous of purchasing the above property from the Chargor as contained in the chargor's letter dated 22nd March 1990 to you (a copy of which is enclosed herewith for your easy reference).
> 2. that the purchase consideration of $150,000.00 shall be paid strictly to you towards account of redemption of the housing loan.
> 3. that as the Chargor/Vendor has been adjudicated bankrupt, a court order for sale of the above property by private treaty is necessary.
>
> To that end, we have our client's instruction to request for your authorisation to make the necessary application for an order that the mortgaged property be sold to our client by private treaty.
>
> We are further instructed that our client will undertake to pay all costs, expenses and incidental charges thereto in connection with or arising from such application.
>
> In the meantime, we enclose herewith a Public Bank Berhad, Petaling Jaya Banker's Draft No 027679 dated 11th May, 1990 for $15,000.00 being the 10% deposit towards the purchase price provided always that in the event that if you fail to obtain an order of the court for the sale of the subject property or if the transaction is aborted for any reason, the said 10% deposit is returned to our client free of interest.
>
> Yours faithfully,
>
> Sgd Illegible.

(f) The Kuala Lumpur High Court did not allow the sale of the property by private treaty and the property was put up for public auction on 11 September 1991 wherein the second respondent became the successful bidder on 11 September 1991 and the sale was concluded. The letter from the Kuala Lumpur High Court dated 12 August 991 addressed to the first respondent can be seen at p 145 of the appeal record and it was worded in this way:

> Adalah dimaklumkan bahawa Mahkamah akan melelong Harta No: Hakmilik H.S.(D) 10863 pada 11hb September 1991 di Mahkamah Tinggi Kuala Lumpur jam lebih kurang 9.30 pagi. Harga rezab yang ditetapkan oleh Mahkamah ialah RM175,000.00.

[21] For 12 years nine months and six days, the second respondent had her name listed as the registered proprietor of the property. On 16 July 1999, the first respondent challenged the order for sale of the property dated 10 October 1986. That was the start of the nightmare for both the appellant bank and the second respondent, so to speak.

[22] In our judgment, the failure to serve the first respondent with the affidavit of Chew Hai Chee was an irregularity and not a nullity O 2 r 1(1) of the Rules of the High Court 1980 ('RHC') states as follows:

> 1 Non-compliance with rules (O 2 r 1)
>
> (1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of any thing done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.

[23] It is quite apparent that O 2 r 1(1) of the RHC has done away with the distinction between irregularity and nullity. Thus, every omission or mistake in practice or procedure is to be regarded as an irregularity which the court should rectify so long as it could do so without causing an injustice (*Re CHS* [1997] 3 MLJ 152 and *Oversea-Chinese Banking Corp Ltd v Measurex Corp Bhd* [2002] 4 SLR 578). What Lord Denning MR said in *Harkness v Bell's Asbestos and Engineering Ltd* [1967] 2 QB 729 (CA) at pp 735–736, should be used as a guideline. There His Lordship said:

> This new rule does away with the old distinction between nullities and irregularities. Every omission or mistake in practice or procedure is henceforward to be regarded as an irregularity which the court can and should rectify so long as it can do so without injustice.

[24] Simply put, a failure to comply with the requirement of the rules would be treated as an irregularity and is curable. But the court has no power to remedy an irregularity which is fundamentally defective. Thus, the failure to include an intitulement of the rule of court or statute under which the court is moved cannot be remedied (*Kanciltek (M) Sdn Bhd v Mayban Finance Berhad* [2000] 4 AMR 4960 at p 4969).

[25] *Golden Ocean Assurance Ltd and World Mariner Shipping SA v Christopher Julian Martin and others (The 'Goldean Mariner')* [1990] 2 Lloyd's Rep 215 (CA), was a case on an irregular service of a writ without an acknowledgment of service and McCowan LJ at p 223 said that the rule should be given wide, though not unlimited effect.

[26] The following irregularities were held to be curable:

(a) the failure to file conditional appearance and defence within the stipulated time was held to be 'mere technicality' which was curable (*Tye Chwee Hoon v Cayman Commodities (M) Sdn Bhd & Anor* [1989] 2 MLJ 317);

(b) the failure of the plaintiff to give one month's notice of his intention to proceed with the action pursuant to O 3 r 6 of the RHC was held to be an irregularity which could be cured because the defendant had ample notice of the application (*Bank Bumiputra Malaysia Bhd v Syarikat Gunong Tujoh Sdn Bhd & Ors* [1990] 1 MLJ 298);

(c) the defective service of a proceeding or a total failure to serve especially where the defendant was aware of the existence of the proceeding was held to be a curable irregularity (*Golden Ocean Assurance Ltd and World Mariner Shipping SA v Christopher Julian Martin and others (The 'Goldean Mariner'*));

(d) the failure to serve the notice of appeal to the respondent was held to be curable because that notice of appeal was annexed to the motion of the appellants in an application for a stay (*Lim Yoon Loy & Ors v Lee Lan* [1990] 2 MLJ 425); and

(e) in a situation where judgment was entered in default of appearance and where appearance was actually entered but not registered by the registry in the cause book it was held to be an irregularity and therefore curable (*Malayan Banking Bhd & Anor v Swasta Jaya Sdn Bhd* [1990] 2 MLJ 12 (SC)).

[27] The case of *Chong Keat Realty Sdn Bhd v Ban Hin Lee Bank Bhd* [2003] 3 MLJ 321 centred on an application to set aside the order for sale that was made some eight years after the order was made. The appellant in that case submitted that the order for sale was invalid because the affidavit in support of the respondent's originating summons did not comply with O 83 r 3 of the RHC. The appellant also submitted that the affidavit did not state the amount due as at the date on which the High Court was being moved for an order for sale. It was further submitted that O 83 r 3 of the RHC was mandatory in nature so that the failure to comply with its terms fatally flawed the order for sale. It was also submitted that the order for sale was a nullity and should be set aside. Gopal Sri Ram JCA (later FCJ) writing for this court aptly said at p 328 of the report:

> Now let us take this very case. Here, we have a situation where the defendant to foreclosure proceedings enters an appearance, instructs counsel who attends the hearing in chambers and raises no opposition whatsoever to the making of the order. Nothing is said about the affidavit being defective. Then, after the passage of some eight years it comes forward with the argument that the order was made

on a defective affidavit and that it ought therefore to be set aside. In our view the appellant's conduct amounts to an abuse of the court's process. If accepted, it would be an affront to justice.

[28] Richard Malanjum JCA (now Chief Judge, Sabah and Sarawak) in *Puspavathy a/p Thaveethu v Majlis Perbandaran Klang & Ors and other appeals* [2008] 6 MLJ 672 had to deal with an order for sale which was challenged as being a nullity because the originating summons was not served on the eighth defendant appellant. At p 679 of the report, this was what His Lordship said:

Now, O 2 r 1 of the RHC states that where in beginning with any proceedings, there is a failure to comply with the requirements of these rules, the failure shall be treated as an irregularity and shall not nullify the proceedings.

[29] Continuing at p 680, His Lordship had this to say:

Thus, applying the principles enunciated in the cases above, we are of the view that the plaintiff's failure to comply with the Rules of the High Court merely renders the order for sale obtained on 6 July 1994 irregular and not a nullity of the whole proceeding. At any rate the said order might be irregular nonetheless it had to be obeyed so long as it had not been set aside. Indeed the said order had been further proceeded with. In this case the second intervener had already purchased the said land at the public auction ordered by the court before it was set aside. Hence, to set aside the said order which was then only irregular at such a late stage would therefore be unfair to the second intervener who had already incurred expenses and committed to obligations after having purchased the said land in a public auction pursuant to order for sale by a court of law of competent authority.

[30] It goes without saying that in the course of litigation, the rules of procedure must be adhered to. That is quite fundamental. The rules of procedure governing litigation would provide the necessary framework for the parties to achieve justice. But too rigid an adherence to the rules, in certain circumstances, may unjustly deprive the rightful party of his rights. The court is entitled to consider each case according to its peculiar facts and make the necessary decision thereto. It is purely an exercise of judicial discretion. And when you talk of discretion, it immediately comes to mind the speech of Cumming-Bruce LJ in *Metroinvest Ansalt v Commercial Union Assurance Co* [1985] 1 WLR 513 (CA) at p 521. There His Lordship said:

I would say that in most cases the way in which the court exercises its powers under O 2 r 1(2) is likely to depend upon whether it appears that the opposite party has suffered prejudice as a direct consequence of the particular irregularity, that is to say, the particular failure to comply with the rules. But I would construe O 2 r 1(2) as being so framed as to give the court the widest possible power in order to do justice.

[31] It is pertinent to point out that the case of *Metroinvest Ansalt v Commercial Union Assurance Co* was followed by *Regenthill Properties Pte Ltd v Management Corporation Strata Title Plan No 2192* [2002] 3 SLR 445 (CA).

[32] The Court of Appeal of Singapore in *Kuah Kok Kim v Chong Lee Leong Seng Co (Pte) Ltd* [1991] 2 MLJ 129 at p 134, sounded a warning that:

> Notwithstanding the very wide powers given to the court to remedy non-compliance with the Rules of Supreme Court 1970 there may be failure or non-compliance with the Rules which is so fundamental or serious that the court ought not to exercise its discretion under r 1 to remedy it: see *Bernstein and another v Jackson and others* [1982] 2 All ER 806.

[33] Certain breaches of the rules are serious in that it may go to the very root or foundation of the legal process. If that happens, the court is reluctant to exercise its discretion in favour of validating that breach.

[34] An application which has no basis in law whatsoever would, as a matter of course, be dismissed forthwith. The Court of Appeal in *Bernstein and another v Jackson and another* [1982] 1 WLR 1082 refused to exercise its discretion under O 2 r 1 and held that the failure to renew a writ within the time specified in the rules was 'such a fundamental defect in the proceedings' that it was not a proper case for the exercise of the discretion. In *Ong & Company Pte Ltd v Carl Y L Chow* [1987] 2 MLJ 430, Chan Sek Keong JC (now the Chief Justice of Singapore) refused to exercise his discretion in regard to an irregularity in service out of the jurisdiction where there was a failure to comply with the pertinent Singapore provisions. At p 432, His Lordship said that 'the plaintiff has in fact disregarded the legal basis upon which the judicial power in Singapore may be exercised in Malaysia. That must render the purported service a nullity'. In *Dubai Bank Ltd v Galadari and others (No 4)* The Times, 23 February 1990 at p 147), Morritt J held that the lack of legal capacity was not a matter which could be remedied by an order under O 2 r 1.

[35] From the authorities, the following propositions may be advanced. Firstly, the seriousness of the irregularity may, in certain instances, be overridden by other considerations of justice and when that happens the discretion to cure would be exercised (*Harkness v Bell's Asbestos and Engineering Ltd*. Secondly, no irregularity or defect would render the proceeding a nullity. Thirdly, O 2 r 1(1) of the RHC, in its present form, gives the court the widest possible power to cure an irregularity in order to do justice. Fourthly, a fundamental procedural failure that affect the foundation of the legal process cannot be cured.

[36] For the reasons alluded to above, it is our judgment that the failure to serve the affidavit of Chew Hai Chee to the first respondent was an irregularity and not a nullity. It was certainly curable.

The third ground

[37] The third ground was worded in this way. That the learned judge of the High Court erred in law in failing to dismiss the first respondent's application to set aside the order for sale after a delay of ten years without giving any valid or reasonable reason for the delay.

[38] It cannot be doubted that there was an inordinate delay of exactly 12 years nine months and six days. It must be recalled that the first respondent's summons in chambers to challenge the order for sale was amended and re-dated '16.7.1999' and the affidavit in support affirmed by the first respondent on 22 October 1996 can be seen at pp 72–73 of the appeal record. At first blush, one can detect that the affidavit in support of the first respondent was dated 22 October 1996 before the date of the summons in chambers which was re-dated '16.7.1999'. That makes no sense and the result would be that that affidavit in support cannot be said to support the summons in chambers. Without an affidavit in support, the summons in chambers would collapse like a deck of cards. At any rate, I have perused through the affidavit in support in question and it contained precious little. It failed to depose to any valid or reasonable reason for the extremely long delay. In its original Malay language text, the affidavit in support in question averred to the following averments (see p 73 of the appeal record):

> 4. Saya telah dinasihatkan dan diberitahu oleh peguamcara saya bahawa Perintah tersebut adalah batal dan tak sah ('null and void') dan tidak berkesan memandangkan bahawa bila Saman tersebut difailkan di Mahkamah yang mulia ini, afidavit sokongan iaitu Afidavit tersebut tidak mengandungi butir-butir yang diperuntukkan dalam Aturan 83, Kaedah 3 Kaedah-Kaedah Mahkamah Tinggi, 1980 dan saya selanjutnya dinasihatkan dan diberitahu oleh Peguamcara saya bahawa peruntukan Aturan 83, Kaedah 3 Kaedah-Kaedah Mahkamah Tinggi 1980 adalah diwajibkan ('mandatory') dan atas kegagalan pihak Plaintif mematuhi kehendak ini Perintah tersebut adalah batal dan tak sah dan Mahkamah yang mulia ini semestinya mengenepikan Perintah tersebut.
>
> 5. Saya selanjutnya memberitahu Mahkamah yang mulia ini bahawa hartanah tersebut telah pun dijualkan oleh Plaintif secara Lelongan Awam pada 11hb September, 1991 kepada pembeli yang bernama KOID SAW EE (P) (No KP 7526501) (selepas ini dirujukkan sebagai 'Pembeli tersebut') untuk jumlah RM196,000.00 dan sekiranya Perintah tersebut dibatalkan maka Mahkamah berkuasa memerintahkan pihak Pendaftar Hakmilik Tanah Negeri Selangor untuk membatalkan Memorial Pindahmilik dari Defendan

kepada Pembeli tersebut dan seterusnya pihak Plaintif seharusnya memulangkan harga belian jumlah RM196,000.00 kepada Pembeli tersebut.

6. Dalam premis tersebut dengan rendah hati saya memohon Perintah Seperti Dipohon permohonan yang difailkan di sini.

[39] There was no explanation for the delay except to say that the affidavit in support of the application for an order for sale — which must necessarily refer to the affidavit of Chew Hai Chee, did not contain the relevant particulars enumerated in O 83 r 3 of the RHC which was said to be mandatory. Consequently, it was urged that this court should set aside the order for sale. And since the property was sold to the second respondent on 11 September 1991 by way of a public auction for the sum of RM196,000, this court should order the Registrar of Land Titles Selangor to cancel the second respondent's name from the memorial of transfer and to return the said sum to the second respondent.

[40] It is our judgment that once the question of delay has been resolved in favour of the appellant bank, the merits of the appeal need not be examined.

[41] Gopal Sri Ram JCA (later FCJ) writing for this court in *Khor Cheng Wah v Sungai Way Leasing Sdn Bhd* [1996] 1 MLJ 223 had occasion to consider the issue of delay and this was what His Lordship said (see pp 229–230 of the report):

> The delay point
>
> It is a cardinal principle of law, that when a litigant seeks the intervention of the court in a matter that affects his rights, he must do so timeously. The maxim *vigilantibus, non dormientibus, jura subveniunt*, though having its origins in the Court of Chancery, is of universal application. Even in cases where a right is exercisable ex debito justitiae, a court may refuse relief to an indolent litigant.
>
> In all cases in which delay in approaching the court is in issue, the burden is upon the litigant who has delayed to render a satisfactory explanation for it. Whether the explanation in a given case is satisfactory or reasonable depends upon the facts and circumstances of each case. And in a matter which involves the exercise of discretion, it is for the judge in whom the law primarily vests the discretion.
>
> The point that is presently under consideration has been authoritatively stated in *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30. It is a decision of the Federal Court and therefore quite plainly binds this court. There, Edgar Joseph Jr FCJ, said (at p 36):
>
> > The general rule is that when it is clearly demonstrated to the satisfaction of the court that a judgment has not been regularly obtained, the defendant is entitled to have it set aside ex debito justicie, that is to say, irrespective of the merits and

without terms. Having said that it should be added that the application to set aside such a judgment should be made: (a) with reasonable promptitude, in other words within a reasonable time; and (b) before the defendant has taken any fresh step after becoming aware of the irregularity (see O 2 r 2(1) of the Rules of the High Court 1980).

In the present case, the explanation of the fourth defendant for the delay in making his explanation is, to summarise his affidavits, that he placed the conduct of his defence in the hands of a solicitor who did little to protect his client's interests.

Is that a reasonable explanation? The learned judge did not think it was. And I agree with him. Undoubtedly, this court will not, whenever feasible, allow a client to suffer for the negligence of his solicitor: see *Cheow Chew Khoon (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman* [1995] 1 MLJ 457 at p 490 per VC George JCA.

But there are limits to what may be done in the interests of justice. After all, justice is not only for a defaulting defendant: it is for the plaintiff as well. And at the end of the day, a careful examination of the facts and circumstances reveals that the fourth defendant did nothing to communicate with his solicitor at any earlier point in time to discover the state in which the litigation against him stood. Surely, it would be injustice to visit the consequences of his indifference upon the plaintiff's head.

There is another factor in this case which turns the scales against the defendant. In fairness to the plaintiff and its solicitors, it must be said of them that they granted to the fourth defendant's solicitors every indulgence in the matter of the delivery of pleadings. The chronology to which I earlier alluded reveals that after warning the defendants' solicitors, they waited for about 18 months before entering default judgment. It is a harsh result indeed if they are to be punished for this.

Once the question of delay is resolved against the fourth defendant, there was little left to be argued upon the question of merits. Nevertheless, I shall examine the second issue raised by the fourth defendant.

[42] The delay of eight years in the case of *Chong Keat Realty Sdn Bhd v Ban Hin Lee Bank Bhd* hindered the appellant's success in that appeal.

[43] Likewise here, the inordinate delay to set aside the order for sale was excessive in the extreme. It cannot be tolerated by this court. The first respondent's application to set aside the order for sale should be dismissed forthwith.

The fourth ground

[44] This ground was worded in this way. The learned judge of the High Court erred in law in failing to dismiss the first respondent's application by relying on the decision of *Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor* [1996] 1 MLJ 374; [1996] 2 CLJ 586 (FC).

[45] Factually speaking, *Muniandy*'s case can easily be distinguished. In that case, the notice of appointment to hear the originating summons was not served on the chargors and the court held that the chargors were deprived of the opportunity of being heard. Here, in sharp contrast, the first respondent was served personally with the notice of appointment to hear the originating summons and he was aware of the hearing date but failed to be present in court on 10 October 1986. It cannot be argued that the first respondent was deprived of the right to be heard.

The fifth ground

[46] This ground concerned the doctrine of estoppel. It was argued that the learned judge of the High Court erred in law in failing to hold that the first respondent was estopped from filing the application to set aside the order for sale after a lapse of 12 years nine months and six days.

[47] The salient facts should be highlighted:

(a) that the first respondent knew of the foreclosure proceedings but failed to defend the action;

(b) that the first respondent knew of the order for sale dated 10 October 1986 but he did not challenge it by filing an appeal, instead through his solicitors he had negotiated for a settlement and he subsequently found the prospective purchaser in the person of the second respondent to sell the charged property by way of a private treaty; and

(c) the first respondent was not prejudiced or misled.

[48] Gopal Sri Ram JCA (later FCJ), writing for the Federal Court, wrote an illuminating judgment on estoppel in the case of *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331. At p 344, His Lordship spoke of the flexibility of the doctrine in these words:

> The time has come for this court to recognise that the doctrine of estoppel is a flexible principle by which justice is done according to the circumstances of the case. It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. Indeed, the circumstances in which the doctrine may operate are endless.

[49] Continuing at p 345, His Lordship had this to say:

> The width of the doctrine has been summed up by Lord Denning in the *Amalgamated Investment case* [1982] 1 QB 84 at p 122; [1981] 3 All ER 577 at p 584; [1981] 3 WLR 565 at p 575) as follows:

> The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with cases. That is why I have not gone through them all in this judgment. It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence, and promissory estoppel. At the same time it has been sought to be limited by a series of maxims: estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption — either of fact or of law — whether due to misrepresentation or mistake makes no difference — on which they have conducted the dealings between them — neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.

[50] Finally, germane to the instant appeal, this was what His Lordship said at p 346:

> Thus far we have dealt with the operation of the doctrine in the context of there having been offered some active encouragement by the party sought to be estopped. But we do not apprehend the law to be different when the encouragement comes in the form of silence. The true principle in such cases is to be found in the following passage in the judgment of Thesiger LJ in *De Busshe v Alt* (1878) 8 Ch D 286 at p 314:
>
> > If a person having a right, and seeing another person about to commit, or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act.

[51] By the conduct of the first respondent after the order for sale was obtained on 10 October 1986, the appellant bank was led to believe that the first respondent was contented that the property was auctioned off and now the first respondent cannot be heard to say that the order for sale has to be set aside.

[52] It was submitted that when the order for sale was made on 10 October 1986, the court was functus officio and the only available remedy for the first respondent was to appeal against the said order and not to file, after a long delay of 12 years nine months and six days, an application to set aside the order for sale.

[53] It is germane, at this juncture, to refer to the case of *MUI Bank Bhd v Cheam Kim Yu (Beh Sai Ming, intervener)* [1992] 2 MLJ 642, a decision of Harun Hashim SCJ. The headnote of that case at p 643 reads:

> (3) The application to intervene was not made until a week after the issue of the certificate of sale by which time the auction sale was completed and the learned judge was functus officio. The order for sale is a final order unless appealed against and once it is made, drawn up and perfected, the learned judge is functus officio and therefore has no power to set aside the order for sale.

[54] *MUI Bank Bhd*'s case favoured the appellant bank and we gratefully apply that case to the instant appeal.

[55] On the question of indefeasibility of title held by the second respondent, the following salient facts should be highlighted:

(a) the public auction was properly conducted and the property was sold to the second respondent and the certificate of sale had been issued;

(b) the second respondent had acquired the property in good faith and for valuable consideration and hence she had acquired an indefeasible title; and

(c) in the public interest, an auction sale of this nature should not be set aside as the public would lose confidence in such auction sales in the future.

[56] Section 340 of the NLC simply declares that a registered title or interest under the Code has the quality of 'indefeasibility', subject to exceptions specified therein. Section 340 of the NLC enacts as follows:

> 340 Registration to confer indefeasible title or interest, except in certain circumstances
>
> (1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.
>
> (2) The title or interest of any such person or body shall not be indefeasible:
>
> (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or
>
> (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or
>
> (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

(3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in subsection (2):

(a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and

(b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested

Provided that nothing in this subsection shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

(4) Nothing in this section shall prejudice or prevent:

(a) the exercise in respect of any land or interest of any power of forfeiture or sale conferred by this Act or any other written law for the time being in force, or any power of avoidance conferred by any such law; or

(b) the determination of any title or interest by operation of law.

[57] It is quite apparent that the Legislature intended to limit the grounds which could render a registered title or interest defeasible to those stipulated in s 340(2) of the NLC. And where there is no evidence that the registered proprietor or the interest holder acquires registration by means of any of the vitiating grounds, then the indefeasibility of title or interest remains intact. However, indefeasibility of title or interest may also be affected by the provisions in ss 340(3) and 340(4) of the NLC. Here, the second respondent acquired indefeasibility of title when she successfully bidded on 11 September 1991. Calculated from 11 September 1991 to 16 July 1999 (the amendment and re-dating of the summons in chambers), the second respondent remained the registered proprietor of the property and had indefeasibility of title thereto for seven years ten months and five days. Her indefeasibility of title was not impinged nor affected by sub-ss (2), (3) and (4) of s 340 of the NLC.

[58] Section 340 of the NLC is the only provision which confers indefeasibility in the Malaysian Torrens system. Terms like 'indefeasibility' and 'defeasible' are expressly used in s 340 of the NLC. It is the act of registration which confers indefeasibility, unless it falls within one of the vitiating factors in s 340(2) of the NLC. In *Teh Bee v K Maruthamuthu* [1977] 2 MLJ 7 at p 10, the Federal Court held that non-compliance with the statutory provisions relating to the mode of alienation of state land may not be fatal where registration has already been effected. In *Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor* [1989] 1 MLJ 457 at p 460, the Privy Council held that the interest of a purchaser of a housing lot who had expressly consented to the creation of the chargee's interest did not prevail over a registered charge.

[59] In *M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294, the Supreme Court judges made reference to 'immediate indefeasible title' and 'deferred indefeasibility' for the very first time. Wan Yahya SCJ delivering the judgment of the Supreme Court said at p 309:

> The last issue is basically on the authority of the court to cancel the name of the purchaser which had by then become indefeasible by subsequent registration. The registration under Chapter 4 of Pt XVIII of the NLC does not necessarily make the title of the land entirely unimpeachable. Indefeasibility can be rebutted not only in instances of fraud but also in cases where registration is obtained by the use of an insufficient or void instrument or where the title or interest is unlawfully acquired. A purchaser of land might fail to obtain a good title in two distinct ways. First, if the title of the vendor is bad. Secondly, even if the vendor has a good title, there might be some invalidating defects in the conveyance or transaction in which the purchaser attempted to obtain the title. These transactions might be void or voidable for a variety of reasons. In the case of a defect in the vendor's title, the common law rule is that no person can give a better title than he had — nemo dat quod non habet. There are, however, important exceptions to this rule, in particular the qualification made under the proviso to s 340(3) of the NLC where a bona fide purchaser for value without notice of the defeasible nature of the vendor's title acquires an immediate indefeasible title. In the case where the vendor's title is good but the instrument which was used by a purchaser for registration is void or voidable, the effect on such registration will only confer on the person in whose name the land is registered, what is usually referred to as deferred indefeasibility — see *Gibbs v Messer* [1891] AC 248. Under this principle, the registration of the insufficient or void instrument can be set aside.

[60] Recently, Arifin Zakaria, Chief Judge (Malaya), in *Tan Ying Hong v Tan Sian San & Ors* [2010] 2 MLJ 1 at p 12 defined the meaning of these two phrases in this way:

> [21] In short, immediate indefeasibility means that the immediate registered title or interest of the proprietor or transferee immediately to the vitiating circumstances will be conferred statutory protection despite the existence of any vitiating circumstances. In the case of deferred indefeasibility, the indefeasibility only comes to be attached to the title or interest upon a subsequent transfer. Thus, the difference between immediate and deferred indefeasibility hinges on the effect of registration vis-a-vis the title or interest.

[61] In *Ong Chat Pang & Anor v Valliappa Chettiar* [1971] 1 MLJ 224 at p 231, Gill CJ cited *Frazer v Walker and Others* [1967] 1 AC 569 and His Lordship then said:

> ... the conception of indefeasibility being central in the system of land registration, so long as land stands registered in the name of a particular person such registration constitutes conclusive evidence that that person is in fact the registered proprietor of the land unless and until his registered title is cancelled or set aside in accordance with some relevant provision of the law.

[62] In *Kho Kwang Choon v Phuman Singh* [1968] 1 MLJ 183 at p 185, Williams J aptly said:

> I am quite aware that in refusing these remedies an unfortunate situation may very well arise. For instance, I can well see difficulties if a mortgagee with an interest prior to that of the defendant in this case obtains an order to sell this land under s 148 of the Land Code. Payment to the defendant may well have to be made by virtue of the provisions of s 151(c) of the Code. But if this was allowed it might necessarily entail an officer of the registry having regard to the memorandum of charge; a document which the court itself could not take cognisance. Then what would be the position if the plaintiff were to transfer his charge for value to another person acting in good faith. Particularly do I realise that the defendant could well be said to be holding the plaintiff to ransom in a manner contrary to those precepts which are basic to all legislation intended to control the activities of moneylenders. In this respect I have very much in mind the reasoning of the learned judge in *Cohen v J Lester Ltd* [1938] 4 All ER 188. But on the other hand to adopt any other course would be doing considerable damage to the principle of 'indefeasibility of title' which underlines the Land Code: a principle which I think the learned Chief Justice rightly had in mind in the decision of *Phuman Singh v Kho Kwang Choon* [1965] 2 MLJ 189 and which was so fully expressed in the case of *Frazer v Walker and others* [1967] 1 All ER 649.

[63] With title in hand, the second respondent had immediate indefeasibility.

CONCLUSION

[64] For the reasons adumbrated above, we allowed the appeal with costs at RM3,000. Deposit to be refunded to the appellant bank.

Appeal allowed with costs.

Reported by Andrew Christopher Simon